United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 74-2496

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

J.W. MAYS, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company interfered with, restrained and coerced its employees, in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1), (3) and (4) of the Act by discriminatorily discharging employee Michael Brandt because he engaged in union activities and testified at a hearing in the Board representation proceeding.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order (A. 44-46, 55-56)[1] issued September 27, 1974, against J.W. Mays, Inc. (hereafter "the Company"). The Board's Decision and Order (A. 3-56) are reported at 213 NLRB No. 49. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Massapequa, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating employees about union activities, threatening and warning employees against engaging in union activities, promising benefits, and creating the impression of surveillance of union activities, as a means of interfering with its employees' union activities. The Board further found that the Company violated Section 8(a)(1), (3) and (4) of the Act by discharging Michael Brandt because he engaged in union activities and testified at a hearing in a Board representation proceeding. The facts underlying the Board's findings are summarized below.

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[1] "A." references are to the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

A. Background: the Union organizing activity and the Company's unlawful response

The Company is a New York corporation engaged in the business of retail sale and distribution of clothing, household appliances, jewelry, cosmetics and related products (A. 5). It owns and operates a chain of retail stores located in the Greater New York area; its retail store at Massapequa, New York, is the only facility directly involved in these proceedings *(ibid.)*.

In late December 1972, night maintenance employee John Cannon contacted Joseph Lunger, a representative of Local Union No. 30, International Union of Operating Engineers, AFL-CIO (hereafter "the Union"), about organizing the Massapequa store employees (A. 120-122). On February 5, 1973, Lunger gave Cannon a number of Union authorization cards and thereafter met with Cannon and other employees in the store parking lot on February 20, March 1 and 9 (A. 122-123, 135-136). In February and early March, Cannon distributed the authorization cards to about five maintenance employees, including Michael Brandt, who subsequently returned signed cards to him in the store parking lot (A. 122-123, 139-140). Later in March, Maintenance Supervisor Paul DeRonde spoke to several employees, advising them that he was against the Union and that joining the Union would not be to the employees' benefit (A. 124).

On March 22, the Union filed a representation petition (Case No. 29-RC-2202) for a unit of all powerhouse and skilled maintenance employees working at the Company's Massapequa store (A. 6). At a hearing on the petition in mid-April the Board received testimony from Supervisor DeRonde and Company Vice President Simon Katz (A. 440). Thereafter Katz instructed Massapequa Store Manager Al Kaye to keep him informed about the Union; Kaye complied with these instructions

(A. 271-272). During this period, DeRonde told the employees in the maintenance area that the vacant position of assistant chief engineer would not be filled until the Company "decided what would be done about the Union" (A. 126-127). A second hearing in the representation case was held on May 2, in which employees Cannon and Brandt testified, as well as DeRonde and Katz (A. 6, 7; 141-142, 165-166, 175, 410-411, 440). On May 29, the Regional Director issued his decision dismissing the representation petition because he found that the unit sought by the petitioner was inappropriate for collective bargaining, since the Company also employed 12 additional maintenance employees in its maintenance-housekeeping department who performed work substantially similar to that performed by the employees sought to be included in the unit.

B. DeRonde threatens reprisals because of the employees' Union activities

On May 29, Cannon telephoned the Company to tell an employee about the decision (A. 7; 124-125, 406-407). Since the employee was not available, Cannon told Supervisor DeRonde, who answered the telephone, to relay the message *(ibid.)*. That afternoon Lunger, Cannon, and other Union representatives met with the day maintenance employees as they left the store (A. 125-126). The next day, Supervisor DeRonde told several employees, including Brandt, that regardless of whether the Union won or lost, the maintenance employees would be terminated because Vice President Katz "had a hate for all of [them] and that he was going to get rid of [them] one way or the other. . . " (A. 8; 144, 146-147, 174-175). DeRonde also observed that if the Union was successful, the employees would be discharged anyway because the Company would demand more skilled employees from the Union (A. 146, 148). Later, DeRonde advised Brandt that because of the Union campaign, all

chances for employee advancement had been eliminated and that there was no chance for Brandt's promotion to the position of assistant chief engineer (A. 8; 146).

C. The Union continues to solicit support; DeRonde interrogates employee Bernard Murphy

Following the Board's May 29 decision in the representation case, that the unit was inappropriate because it failed to include the maintenance-housekeeping employees, Brandt asked several housekeeping and display department employees to sign Union authorization cards (A. 8; 141-142). Brandt spoke to employees during lunch and coffee breaks, while on the escalator, the elevator, and the stairs, and while otherwise passing through the store (A. 142, 163, 175-176). About June 7, Supervisor Harry Schob observed Brandt talking with maintenance employee Bernard Murphy, and when Brandt left, Schob approached Murphy and asked him whether Brandt and he were talking about the Union (A. 21; 91, 381-383). Murphy replied that Brandt had asked him to sign a Union card *(ibid.)*.

D. DeRonde interrogates employee Frank Coletto and impliedly threatens to discharge him

About this time, DeRonde questioned employee Frank Coletto as to whether he had signed an authorization card (A. 40-41; 104-105). When Coletto answered affirmatively, DeRonde warned that Coletto could be in trouble for supporting the Union *(ibid.)*. In a later conversation, DeRonde informed Coletto that if he had to pay a certain salary because of the Union presence at the store, he would hire specialized, qualified individuals such as electricians and air-conditioning men, implying that less skilled men such as Coletto would be terminated (A. 41; 105).

E. Brandt is told not to solicit support for the Union

On the afternoon of June 7, Brandt was summoned to the office of Store Manager Al Kaye; Vice President Katz and Supervisor DeRonde were also present (A. 8-9; 148-149, 160, 289-290). Katz asserted that he did not want Brandt soliciting for the Union on Company time and that it was against the rules (A. 8-9; 148-149). Brandt refused to admit any Union involvement but Katz warned him that further solicitation on behalf of the Union would result in his dismissal (A. 9; 149, 267-268). A written note of the discharge warning was placed in Brandt's personnel folder (A. 9; 92, 268-269).

On June 11, DeRonde arrived at the store at 7:15 a.m. and observed Brandt talking to employee Laura Gribbins in the hardware department (A. 9; 149-151, 196-198, 418). The subject of the conversation was the time and location of a Union meeting and the number of authorization cards that had been signed (A. 150, 197-198). During the 9:00 o'clock coffee break, DeRonde accused Brandt of failing to do his work and Brandt denied the charge (A. 9; 151, 409-410). Following this exchange, DeRonde reportedly advised Katz that Brandt was neglecting his work and Katz ordered DeRonde to give Brandt a reprimand (A. 9-10; 409-410). DeRonde then filled out a reprimand form and presented it to Brandt, but the latter refused to sign it (A. 10; 153-154, 409-410).

F. Supervisor Charles Hord interrogates and threatens to discharge employee Laura Gribbins

In the late morning of June 11, Display Director Charles Hord called Gribbins into his office and informed her that she had been seen talking to Brandt in the hardware department (A. 25; 196). He asked Gribbins if she had spoken to Brandt about the Union *(ibid.)*. Gribbins

falsely replied that she had not, and stated that she was talking about light fixtures for a window (A. 25; 196-197). Hord also asked her if she had heard anything about the Union and she said that she was aware of the organizational efforts at the store *(ibid.)*. He then warned her that she "should stay away from such people because other unions had tried to get into the Mays Department Stores previously and that it had never . . . worked and that people were getting fired because of this and that [she] should stay away from it *(ibid.)*.

G. The Company discharges Brandt

Around lunchtime on June 12, Brandt encountered employee Florine Strayhorn as she was going down the steps from the first floor to the basement and asked her if she was joining the Union (A. 12-13; 160-161, 396-397). Strayhorn said no, and later informed Store Manager Kaye of this conversation (A. 10, 13; 281, 396-397). On June 13, DeRonde brought Brandt into Kaye's office where Vice President Katz was waiting (A. 10; 155-156, 411). Katz stated that he had been notified on the evening of June 12 that Brandt was continuing to solicit employee support for the Union (A. 10; 156, 269-270). Katz then asked Brandt to sign a resignation form, warning that if he did not sign, the Company would tell prospective employers who requested references on Brandt that he participated in organizational activity (A. 156). Brandt again denied that he had solicited on Company time and refused to sign the resignation form (A. 10; 156-157, 269-270). Katz then terminated Brandt *(ibid.)*.

H. Hord promises Gribbins a promotion and an increase in salary

On about June 19, Display Director Hord notified Gribbins that she was to be transferred from Massapequa to the Levittown store (A. 27;

198). When she inquired about the reason for the change, Hord retorted, "you're just being transferred, don't ask any questions about it" *(ibid.)*. She complained that Hord was trying to force her to quit and stated that he may as well fire her and record the real reason as being her involvement with the Union (A. 27; 198-199). Hord claimed he knew nothing about any union and promised her an assistant manager's job and an increase in salary if she went to the Levittown store *(ibid.)*.

I. Schob interrogates and threatens employee Christopher Lynch

Around June 20, employee Christopher Lynch spoke with Cannon about the Union (A. 41; 238-240). Kaye saw the two employees talking and instructed Supervisor Harry Schob to obtain a statement from Lynch regarding his conversation with Cannon because the Company was "having a union problem" (A. 41; 238-239, 240-241, 304-305, 327-329, 373, 375-376). Schob approached Lynch, gave him a piece of paper and directed Lynch to write down what he and Cannon had discussed (A. 41; 238-239). When Lynch asked Schob what would happen if he refused to write the statement, Schob responded, "It could be your job or his [Cannon's]" (A. 41-42; 238-241). Lynch acquiesced and wrote that he and Cannon were talking about the Union and how a union benefits employees (A. 41; 239). Schob took the statement and left but later returned to Lynch and told him that Kaye did not like the way the statement was written (A. 41; 239-240). Schob instructed Lynch to correct the spelling of Cannon's name, to add that Cannon had talked to him in the elevator while they were working, and to note that Cannon had not asked him to join the Union (A. 41; 93, 240, 243). Lynch wrote this amended version on a new sheet of paper, and Schob took this one along with the original (A. 93, 240).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities; by threatening reprisals for engaging in union activities; by warning employees to refrain from union activities; by promising benefits in return for ceasing union activities; and by creating the impression of surveillance of union activities (A. 44). The Board further found that the Company violated Section 8(a)(3), (4) and (1) of the Act by discharging Brandt because of his union activities and in retaliation for his having testified before in the Board representation proceedings (A. 28).[2]

The Board's order requires the Company to cease and desist from the unfair labor practice found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act. Affirmatively, the order requires the Company to offer Brandt unconditional reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges, to make him whole for any loss of earnings suffered as a result of the discrimination, and to post appropriate notices (A. 44-46, 55-56).

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[2] The Board also concluded that there was insufficient evidence to warrant a finding that the transfer and termination of employee Laura Gribbins and the termination of employees William Fazzio, Paul Dashefsky, and Bernard Murphy violated the Act. Finally, the Board declined to make certain additional findings of independent violations of Section 8(a)(1).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

The credited evidence shows that during the Union's organizational campaign, the Company employed threats, promise of benefits and other coercive tactics in an effort to discouarge union adherence by its employees.

1. Threats

As shown in the Statement, *supra*, the Company openly threatened several employees with various forms of economic reprisal to discourage unionization of its Massapequa store. Thus, following the Union's filing of its representation petition and the Board hearing in mid-April, Supervisor DeRonde told several employees that no one would be promoted to the position of assistant chief engineer until the Company resolved the union matter. In May, DeRonde told a number of employees, including Michael Brandt, that the maintenance employees were going to be fired regardless of whether the Union won or lost, because Vice President Katz disliked them, and that if the Union won the Company would insist upon more skilled employees. Later, DeRonde advised Brandt that any possibility of employee advancement had been foreclosed because of the Union movement and that there was no further chance of Brandt's being promoted to assistant chief engineer. In early June, DeRonde warned employee Frank Coletto that he could be in trouble for signing a Union authorization card. In a subsequent conversation DeRonde told Coletto that if the Company had to pay certain salaries because the employees were represented by the Union it would hire electricians, air-conditioning men and other skilled workers. DeRonde thus left the impression that less qualified employees like Coletto would be terminated.

On June 7, Katz directed Brandt to refrain from further solicitation for the Union, warning him that the continuation of such activity would result in his discharge. Similarly, Display Director Charles Hord admonished employee Laura Gribbins on June 11 to avoid associating with Union people because employees were being fired for supporting the Union. Finally, in late June, Supervisor Harry Schob informed employee Christopher Lynch that if he refused to write out a statement describing his Union conversation with employee John Cannon either Lynch or Cannon could be discharged.

Clearly, these warnings and threats of discharge and loss of possible benefits designed to discourage union activity were violative of Section 8(a)(1) of the Act. *N.L.R.B. v. L.E. Farrell Co., Inc.*, 360 F.2d 205, 207 (C.A. 2, 1966); *Irving Air Chute Co., Inc. v. N.L.R.B.*, 350 F.2d 176, 178-179 (C.A. 2, 1965); *Edward Fields, Inc. v. N.L.R.B.*, 325 F.2d 754, 760 (C.A. 2, 1963).[3]

2. Interrogation

It is settled law that an employer violates Section 8(a)(1) of the Act by coercively questioning employees about their union sentiments or activities. *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132-

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[3] Conflicts in testimony concerning the remarks of DeRonde, Hord and other Company representatives were resolved by the Administrative Law Judge based, *inter alia*, upon his observations of the demeanor of witnesses. It is settled law that credibility resolutions are within the special province of the trier of fact and should not be overturned on review absent extraordinary circumstances not present here. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

133 (C.A. 2, 1970).[4] As noted *supra*, the record is replete with instances of Company interrogation of employees concerning their union activities. Thus, the evidence shows that Schob questioned employee Bernard Murphy on June 7 as to whether Brandt had been talking about the Union again. Likewise, on June 11, Hord summoned Gribbins into his office, shut the door, and asked her if she had been discussing the Union with Brandt and whether she had heard anything about the Union. Gribbins replied that she was aware of the organizational drive, but falsely denied talking with Brandt about the Union – thereby indicating an effort by one intimidated to conceal her union adherence. See, *N.L.R.B. v. Milco, Inc., supra*, 388 F.2d at 137. In another incident, DeRonde asked Coletto whether he had signed an authorization card. Finally, around June 20, Schob approached employee Christopher Lynch and compelled him not only to disclose the contents of his Union conversation with Cannon but also to give a written statement concerning it. In all of these instances, the Company's representatives failed to explain the purpose of their inquiries, and did not give the employees any assurances against retaliation.

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[4] In determining whether a particular interrogation is coercive, this Court has stated that some of the relevant considerations include: "[1] whether there is a background of employer hostility and discrimination; [2] whether the employer seeks information necessary to test a claimed majority or seeks to ferret out information most useful for purposes of discrimination, as when employees are asked to identify union supporters . . .; [3] whether the identity of the questioner and [4] the place or method of interrogation lent the activity an aura of formality that added to its coercive tendency; and [5] whether the reply was truthful so as to indicate an absence of felt intimidation, or evasive or false so as to indicate an effort by one intimidated to conceal his true allegiance." *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2, 1968). Accord: *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2, 1964). These five criteria are not all-inclusive (*N.L.R.B. v. Lorben Corporation* 345 F.2d 346, 348 (C. A. 2, 1965); *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565, 567 (C.A. 2, 1967), cert. denied, 392 U.S. 908); none of them is by itself controlling, nor is it necessary that all five indicia be present in each case. *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132 (C.A. 2, 1970); *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970); *N.L.R.B. v. Scoler's, Incorporated*, 466 F.2d 1289, 1291 (C.A. 2, 1972).

Indeed, in all but one instance, the questioning was coupled with threats of discharge and other reprisals. In the circumstances presented, the interrogation resorted to by the Company, as the Board found, was clearly coercive, and the Company thereby violated Section 8(a)(1) of the Act. *N.L.R.B. v. L.E. Farrell Company, Inc.*, 360 F.2d 205, 207 (C.A. 2, 1966). See also, *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970).

3. Promise of benefit

It is also unlawful for an employer to promise an employee benefits which are expressly or implicitly contingent on the employee's rejection of a union. *N.L.R.B. v. Rollins Telecasting, Inc.*, 494 F.2d 80 (C.A. 2, 1974), cert. denied, 95 S.Ct. 224; *N.L.R.B. v. A & S Electronic Die Corp., supra*, 423 F.2d 220; *Snyder Tank Corp. v. N.L.R.B.*, 428 F.2d 1348, 1350 (C.A. 2, 1970), cert. den., 400 U.S. 1021. Here, the record reveals that on June 11, after Display Director Hord interrogated and threatened to discharge Gribbins for engaging in union activities, he asked her if she was interested in an assistant manager's job in the display department, and she said she was (A. 16; Tr. 272). When Hord informed her that the job was in Levittown, she declined, because she had no means of transportation to Levittown *(ibid.)*. A few days later, on June 19, Hord notified Gribbins that she was to be transferred to the Levittown store. When Gribbins protested, stating that she may as well be fired because of her union activities, Hord claimed a lack of knowledge about the Union and promised her an assistant manager's job and a salary increase if she accepted the transfer. In this context of anti-union hostility, the promise of benefits to Gribbins was plainly designed to remove her from the store because she was participating in union activities and therefore constituted a violation of Section 8(a)(1) of the Act.

4. Impression of Surveillance

The undisputed facts show that in late June, Schob advised Lynch that Store Manager Kaye had observed Lynch talking with Cannon about the Union on one of the elevators. As shown above, this statement was accompanied by Schob's coercive interrogation and threat of discharge if Lynch refused to write down what he and Cannon were discussing. In an anti-union atmosphere a statement such as Schob's necessarily inhibits free exchange of views among the employees, since the impression is conveyed that union activity is being monitored by the Company. Hence, this Court has consistently held that management statements which create an impression of surveillance are violative of Section 8(a)(1) of the Act. *N.L.R.B. v. Long Island Airport Limousine*, 468 F.2d 292, 299 (C.A. 2, 1972); *N.L.R.B. v. S & H Grossinger's, Inc.*, 372 F.2d 26, 28 (C.A. 2, 1967).[5]

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1), (3) AND (4) OF THE ACT BY DISCRIMINATORILY DISCHARGING EMPLOYEE MICHAEL BRANDT BECAUSE HE ENGAGED IN UNION ACTIVITIES AND TESTIFIED AT A HEARING IN THE BOARD REPRESENTATION PROCEEDING

As shown in the Statement, *supra*, the Company admittedly discharged Brandt for engaging in organizational activity. Before the Board, however, the Company claimed that it was justified in discharging Brandt because he violated its rule against solicitation, and failed to heed Katz's

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[5] The record reflects that on other occasions Company representatives gave employees the unmistaken impression that their union activities were under surveillance. Thus, on June 11, Hord told Gribbins in the context of anti-union remarks and interrogations, that she had been seen talking with Brandt, a known Union activist (A. 25; 196, 418). Similarly, Schob notified Murphy that he had been seen talking with Brandt (A. 21).

specific warning on June 7 that he would be dismissed if he solicited any more for the Union during working hours. This contention is totally lacking in merit. While a rule which prohibits union solicitation during the employees' working time is presumptively valid (*Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 803 (1945)), the presumption of validity may be overcome if the rule is promulgated or enforced in a discriminatory manner. See, *e.g.*, *N.L.R.B. v. Daylin, Inc., Discount Division*, 496 F.2d 484, 488 (C.A. 6, 1974); *William L. Bonnell Co. v. N.L.R.B.*, 405 F.2d 593, 595 (C.A. 5, 1969). As we show below, the Board properly rejected this defense, for the evidence does not show that the Company in fact had a no-solicitation rule of which the employees were aware. The evidence does disclose, on the other hand, that there were many types of employee solicitation for other purposes on Company worktime so that the proscription against Brandt's soliciting for the Union was discriminatory and his discharge for violating that proscription was unlawful under Section 8(a)(3) and (1) of the Act.

For some period prior to September 1972, the Company distributed a booklet to all new employees which contained general guidelines for employee conduct (A. 10-11; 95, 264). One direction stated that employees were to "refrain from holding personal conversations during work," and another stated that there was to be "no solicitation or distribution of any sort during work or in any of the public areas of the store" (A. 11; 95). The Board assumed that these directions constituted valid rules of employee conduct, but it went on to note the record evidence showing that the booklet was not circulated to employees after September 1972 (A. 11; 264). Vice President Katz testified that publication of the booklet ceased as the result of a dispute with the Department of Labor and ensuing litigation *(ibid.)*. Brandt began work at the Company's store in January 1973, and during the period that he was employed, the

employees were never notified of the existence of the no-solicitation rule as stated in the booklet (A. 11; 112, 154, 177, 188, 254).[6]

Not only is the record devoid of evidence that the Company had a no-solicitation rule that was communicated to the employees, but there is no evidence of disciplinary action being taken against an employee for violating such a rule. In contrast to the drastic discipline meted out to Brandt because he solicited for the Union, the evidence shows that soliciting for other purposes were commonly engaged in during working hours with management's knowledge and sanction. Thus, members of a voluntary organization known as Mays Employee Association often circulated among the employees during the work day, organizing social and recreational activities, selling chances on raffles, and collecting money for flowers for sick employees or when an employee had a death in the family (A. 11-12; 112-113, 154-155, 209-213, 233-234). Indeed, it is undisputed that Floor Supervisor Lucille Tedeschi frequently approached employees while they were working and attempted to persuade them to join the Mays Employee Association (A. 154-155, 209-211). In addition, Company officials admittedly convened employee meetings for the purpose of collecting donations for the United Fund and the State of Israel. These meetings were held at a time when many employees, including maintenance, housekeeping and display personnel, had already commenced working (A. 12; 233-236, 283-284, 319-321). Finally, it was common practice for employees freely to converse with one another during working hours (A. 113, 118-119, 154-155, 177-178, 421-422).

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[6] Supervisor DeRonde testified that he was unaware of the existence of a no-solicitation rule, prior to Katz' prohibition against Brandt's soliciting for the Union (A. 11; 423).

In sum, it is evident that the no-solicitation guideline had become moribund after September 1972 since it was neither communicated to employees nor enforced against possible violators. In fact, the Company had permitted and even sponsored, solicitations of various kinds during the working day. The guideline was resurrected and transformed into a stringent rule at the advent of union activity and vigorously applied, in a first instance, to Brandt, a principal Union advocate. Under these circumstances, and considering the Company's pattern of conduct hostile to the unionization effort, the Board properly found that the purported rule against solicitation "was discriminatorily applied in Brandt's case, and therefore could not have provided a valid ground for his termination" (A. 12). See *Commercial Controls Corp. v. N.L.R.B.*, 258 F.2d 102, 103 (C.A. 2, 1958); *N.L.R.B. v. Electro Plastic Fabrics, Inc.*, 381 F.2d 374, 376 (C.A. 4, 1967); *N.L.R.B. v. Heck's, Inc.*, 386 F.2d 317, 319 (C.A. 4, 1967); *William L. Bonnell Co. v. N.L.R.B.*, 405 F.2d 593, 595 (C.A. 5, 1969); *N.L.R.B. v. Daylin, Inc., Discount Division*, 496 F.2d 484, 488 (C.A. 6, 1974); *N.L.R.B. v. E.D.S. Service Corp.*, 466 F.2d 157 (C.A. 9, 1972); *N.L.R.B. v. Dayton Tire & Rubber Co.*, 503 F.2d 759, 762-763 (C.A. 10, 1974).[7]

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[7] In addition, the Board properly concluded that the same factors which support the finding of a Section 8(a)(3) violation also justify the logical inference that Brandt's termination was "in retaliation for Brandt's testimony in the NLRB representation matter" and therefore violated Section 8(a)(4) of the Act (A. 13-14). See *N.L.R.B. v. Scrivener*, 405 U.S. 117 (1972). Here, the Board's finding of a Section 8(a)(4) violation is amply supported by the evidence on the record as a whole.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.[8]

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February, 1975.

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[8] The Board's order requires the Company to cease and desist from the unlawful conduct found and from "in any other manner" interfering with its employees' Section 7 rights. The Board found this broad form of order appropriate in view of the Company's "extensive violations of the Act" (A. 55). Such an order is particularly appropriate where, as here, there has been employer discrimination based on union activity, for a violation of Section 8(a)(3) "goes to the very heart of the Act." *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941). The Board's "broad discretion" in fashioning remedial orders has been recognized by this Court. *Lipman Motors, Inc. v. N.L.R.B.*, 451 F.2d 823, 829 (1971), and cases cited. The Board was within its discretion in concluding on this record that the range and intensity of the Company's anti-union activity – the unlawful discharge of Brandt, coercive interrogation, threats of reprisal, warnings to refrain from union activity, promises of benefits and creating the impression of surveillance – was sufficiently great that a broad order was appropriate. See, *Bausch & Lomb Optical Co. v. N.L.R.B.*, 217 F 2d 575, 578 (C.A. 2, 1954), enf'g., 107 NLRB 790, 791 (1954); *N.L.R.B. v. Charles R. Krimm Lumber Co.*, 203 F.2d 194, 196 (C.A. 2, 1953); *Morgan Precision Parts v. N.L.R.B.*, 444 F.2d 1210, 1215 (C.A. 5, 1971); *Central Mercedita, Inc. v. N.L.R.B.*, 288 F.2d 809, 812 (C.A. 1, 1961); *N.L.R.B. v. Mayrath Co.*, 319 F.2d 424, 428 (C.A. 7, 1963).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	No. 74-2496
v.	)	
	)	
J.W. MAYS, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 10th day of February, 1975